

CB Land Sdn Bhd v Perunding Hashim & Neh Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02
(IM)-1571-09 OF 2015

DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
1 SEPTEMBER 2016

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Limitation — Accrual of cause of action — When cause of action accrued — Respondent as civil and structural engineer for appellant's apartment development project failed to pay costs for collateral works — Appellant sued for costs — Respondent applied to strike out appellant's action pursuant to O 18 r 19 of the Rules of Court 2012 on basis that cause of action time-barred under the Limitation Act 1953 — Whether appellant's claim time-barred — Whether there were triable issues — Limitation Act 1953 — Rules of Court 2012 O 18 r 19

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The appellant was the design and build contractor for a development project in Petaling, Selangor ('the project') whereas the respondent was appointed by the appellant as civil and structural engineer for the project. The appellant had also appointed Pembinaan dan Pembangunan Serantau Sdn Bhd ('PPS') as the main contractor of the project. On 24 July 2009, the respondent informed the appellant that there were structural defects in the apartment building and briefed them of its proposal to strengthen the said structural defects. The respondent subsequently appointed RNC Technology Sdn Bhd to carry out the enhancement work for structural defects. As for the collateral works, it would be carried out by PPS but the costs incurred for the said works would be borne by the respondent. The respondent failed to pay the said costs, thus the appellant sued the respondent to claim RM1,910,918 being the costs for the collateral works. The respondent then made an application pursuant to O 18 r 19 of the Rules of Court 2012 to strike out the appellant's writ of summons and statement of claim on the basis that the cause of action under both contract and tort were time-barred under the Limitation Act 1953. The trial judge allowed the application, hence this appeal. The respondent submitted that the appellant's cause of action would have arisen when the tender drawings were prepared, completed and issued during the preliminary and design stages in around June and July 2006 or on 25 November 2008 when the works completed. On the other hand, the appellant submitted that the claim was not time-barred as the appellant only came to know of the structural defects when they were notified by the respondent themselves on 24 July 2009.

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Held, allowing the appeal with costs of RM20,000 subject to allocator; setting aside the decision of the High Court; and remitting the case to the High Court for full trial:

- A (1) On the facts and the law, there were triable issues of fact raised which could only be resolved by viva voce evidence at the trial and not merely by affidavit. The date of accrual of a cause of action is crucial to determine whether an action is time-barred as time runs from the date the cause of action arose. In the present appeal, there was a dispute as to the factual matrix of the case in particular with respect to the existence and discovery of the structural defects. Thus, there was an appealable error that had been shown by the appellant that properly justify an appellate intervention (see paras 34–36).
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C **[Bahasa Malaysia summary]**

- Perayu adalah kontraktor reka bentuk dan bina bagi projek pembangunan di Petaling, Selangor ('projek') sementara responden adalah dilantik oleh perayu sebagai jurutera sivil dan struktur bagi projek tersebut. Perayu juga telah melantik Pembinaan dan Pembangunan Serantau Sdn Bhd ('PPS') sebagai kontraktor utama projek tersebut. Pada 24 Julai 2009, responden memberitahu perayu bahawa terdapat kecacatan struktur dalam bangunan pangsapuri tersebut dan memberitahu mereka mengenai cadangannya untuk mengukuhkan kecacatan struktur tersebut. Responden kemudiannya melantik RNC Technology Sdn Bhd untuk menjalankan kerja penambahan bagi kecacatan struktur tersebut. Untuk kerja-kerja kolateral, ia akan dijalankan oleh PPS tetapi kos yang ditanggung bagi kerja-kerja tersebut akan ditanggung oleh responden. Responden gagal untuk membayar kos-kos tersebut, oleh itu perayu menyaman responden untuk menuntut RM1,910,918 sebagai kos bagi kerja-kerja kolateral. Responden kemudiannya membuat permohonan berikutan kepada A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan writ saman perayu dan pernyataan tuntutan atas dasar bahawa kausa tindakan di bawah kedua-dua kontrak dan tort dihalang had masa di bawah Akta Had Masa 1953. Hakim perbicaraan membenarkan permohonan tersebut, maka rayuan ini. Responden berhujah bahawa kausa tindakan perayu akan berbangkit apabila lakaran yang ditenderkan disediakan, disiapkan dan dikeluarkan semasa peringkat awalan dan reka bentuk sekitar Jun dan Julai 2006 atau pada 25 November 2008 apabila kerja-kerja siap. Sebaliknya, perayu berhujah bahawa tuntutan tidak dihalang masa kerana perayu hanya mengetahui mengenai kecacatan struktur apabila mereka diberitahu oleh responden sendiri pada 24 Julai 2009.
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Diputuskan, membenarkan rayuan dengan kos sebanyak RM20,000 tertakluk kepada alokatur; mengetepikan keputusan Mahkamah Tinggi; meremit kes kembali ke Mahkamah Tinggi untuk perbicaraan penuh:

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- (1) Atas fakta dan undang-undang, terdapat isu-isu yang boleh dibicarakan terhadap fakta yang dibangkitkan yang hanya mungkin boleh diselesaikan melalui keterangan viva voce pada perbicaraan dan bukan semata-mata melalui affidavit. Tarikh terakhir kausa tindakan adalah

penting untuk menentukan sama ada tindakan adalah dihalang masa kerana masa bergerak dari tarikh kausa tindakan berbangkit. Dalam rayuan ini, terdapat pertikaian terhadap fakta matriks kes terutamanya berkaitan kepada kewujudan dan penemuan kecacatan struktur. Oleh itu, terdapat kesilapan rayuan yang telah ditunjukkan oleh perayu yang menjustifikasikan dengan betul campur tangan mahkamah rayuan (lihat perenggan 34–36).]

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Notes

For cases on whether cause of action accrued, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2254–2255.

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Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417; [2000] 2 CLJ 457, CA (refd)

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AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663, CA (refd)

AmBank (M) Bhd v Kamariyah bt Hamdan & Anor [2013] 5 MLJ 448, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

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Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113; [1996] 4 CLJ 716, FC (refd)

Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558; [1999] 2 CLJ 886, HC (refd)

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Legislation referred to

Limitation Act 1953 ss 6(1), 26(2)

Rules of Court 2012 O 18 rr 19, 19(1)(a)

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Appeal from: Civil Suit No 22NCVC-73–02 of 2015 (High Court, Shah Alam)

Kee Pei Kim (Jef Leong, Poon & Wong) for the appellant.

HL Choon (Raja Darryl & Loh) for the respondent.

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Hasnah Hashim JCA:

[1] This is an appeal against the decision of the learned judge allowing the respondent's notice of application dated 3 April 2015 pursuant to O 18 r 19 of the Rules of Court 2012 ('the ROC') to strike out the appellant's writ of summons and statement of claim. The basis of the respondent's application to strike out the appellant's claim is that the cause of action under both contract and tort are time-barred under the Limitation Act 1953.

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A [2] We heard the appeal on 14 March 2016 and after hearing the parties, we adjourned the matter for our consideration. We now deliver our decision and the reasons for the same.

SUMMARY OF MATERIAL FACTS

B [3] The appellant is in the business of property investment and property development and the respondent is in the business of undertaking, implementing and executing all kinds of engineering consultancy services in all fields of engineering. The appellant was appointed by Syarikat Perumahan Negara Bhd ('the employer') as its design and build contractor to construct 435 units of apartments ('Phase 1') on part of Lots 13824 and 13825, Mukim Damansara, District of Petaling, Selangor Darul Ehsan ('the project'). The appellant and the employer entered into a development agreement on 2 March 2007.

D [4] Crestland Project Management Sdn Bhd ('CPM') had on behalf of the appellant appointed the respondent as civil and structural engineer for the project. The appointment was formalised by a letter dated 5 July 2005 issued by CPM to the respondent. Pembinaan dan Pembangunan Serantau Sdn Bhd ('PPS') was appointed as the main contractor of the project by the appellant.

F [5] The respondent's scope of work for the project includes planning, design and construction supervision of the local infrastructures for connection to existing infrastructure, initiating site investigation works and structural engineering services for the project. On 24 July 2009 the respondent informed all parties present at a meeting that there were structural defects in the apartment building (Phase 1 of the project). The respondent briefed the parties of its proposal to strengthen the said structural defects.

G [6] During the said meeting the respondent had handed the strengthening proposal to the appellant. Under the said proposal respondent will reinforce and thicken the concrete shear walls by 50mm on one side and column jacketing.

H [7] The proposal however would result in the reduction of the floor area to the units as set out in sale and purchase agreements of the apartment units. The respondent then agreed to submit an alternative proposal to rectify the structural defects by 31 July 2009.

I [8] By a letter dated 29 July 2009 the respondent informed the appellant that they found the 125mm thick load bearing concrete walls from the 2nd floor to the 16th floor of the project to be structurally inadequate as the ultimate structural capacities were found to be lower than the ultimate loads.

[9] Further reviews of the structural design and drawings with architectural drawings and a presentation of the additional areas involving concrete walls, Level 16 (water tank beams) and Level 2 transfer beams were conducted. A special technical meeting was held at the appellant's office on 25 August 2009 to discuss the various proposed methods to rectify and repair the structural defects.

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[10] Sometime in September 2009, the appellant accepted the need for the respondent to provide the required enhancement to the identified beams. The respondent submitted their draft tender documents together with their completed set of the structural drawings relating to the enhancement work of structural defects for the appellant's review and comment on 17 September 2009.

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[11] Upon the request of the respondent, by an internal memorandum dated 26 September 2009 to PPS, the appellant requested PPS to provide all necessary information relating to making good defects such as floor tiles, plastering, skim coat and repainting of wall and mechanical and engineering on the completion of the respondent's enhancement work for structural defects. On 23 November 2009 the appellant informed the respondent that the respondent was to appoint directly the successful tender of a specialist contractor for the aforesaid enhancement work of structural defect. The respondent was responsible for all the working arrangement and issues relating to the award with the specialist contractor.

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[12] It was agreed by the parties:

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- (a) the date of completion for the enhancement work of structural defects would be 4 June 2010;
- (b) collated works and completion of the whole building and main infrastructure (such as to be ready for certificate of fitness inspection) would be by 30 June 2010; and
- (c) handover of the apartment units with certificate of fitness to the employer would be on 6 August 2010.

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THE APPELLANT'S SUBMISSION

[13] It was the appellant's pleaded case that the structural defects arose as a result of the respondent's revision of the thickness of the shear walls of the apartment building from 150mm–125mm. The appellant contended that the parties agreed that the appellant was to engage PPS directly to carry out the collateral works in place of the respondent as PPS was already the main contractor for the project. It was also agreed that the payment of the collateral works would be made by the respondent since the collateral works to be carried

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- A** out were wholly consequent of the structural defects caused by the respondent's negligence and or failure to discharge its contractual duty as the appellant's civil and structural engineer for the project. However, the payment for the collateral works would be paid by the appellant. The respondent would be making the payment for the collateral works to the appellant immediately once payment had been made by the appellant to PPS.
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- C** [14] On 15 December 2009 the appellant wrote to the respondent enclosing a copy of PPS's report on the rectification of the structural defects as well as comments on the enhancement work for structural defects for the respondent's immediate attention and action. The appellant also informed the respondent of the urgency and necessity for the respondent's civil and structural and architect consultants to address the scope of the collateral works including preliminaries, specifications and schedule of works as enclosed with its letter.

- D** [15] On 16 December 2009 the respondent confirmed the schedule of completed works that would be affected by the enhancement work for the structural defects and agreed that the said work for structural defects would be carried out by the concrete specialist contractor to be appointed by the respondent. The collateral works would be carried out by PPS but the costs incurred for the said works would be borne by the respondent.
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- F** [16] By a letter of award dated 16 December 2009, the respondent awarded the tender to RNC Technology Sdn Bhd ('RNC') to carry out the enhancement work for structural defects.

- G** [17] On completion of the said enhancement work of the structural defects by RNC on or about in June 2010, PPS had immediately commenced the collateral works as agreed. The collateral works was completed on or about in February 2011 and the project was handed over to the employer on 17 May 2012.

- H** [18] On 28 October 2010, the appellant, on receipt of PPS's progress claim No 1 for the net amount of RM1,910,918 for the collateral works carried out and completed for the project as at 12 October 2010, submitted the aforesaid progress claim to the respondent on 2 November 2010 for payment. Since there was no response from the respondent the same progress claim was again sent to the respondent for payment to be made.

- I** [19] It is contended by the appellant that the respondent acknowledged the receipt of the progress claim but failed, refused and/or neglected to make the necessary payment for the sum due and owing to the appellant which would then be paid by the appellant to PPS.

[20] The appellant made several payments totalling a sum of RM1.9m to PPS on behalf of the respondent for the sum due and owing. The respondent was duly notified of the arrangement and did not raise any objection. It is contended by the learned counsel for the appellant that there is an outstanding balance of RM10,918 which is due to be paid by the appellant to PPS. PPS agreed to withhold from demanding the said amount until the appellant received the payment of the balance from the respondent.

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[21] The appellant issued several demands to the respondent between 2 November 2010–16 April 2014 for the repayment of the sum due and owing from the respondent. The respondent failed to pay the outstanding sum owing.

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THE RESPONDENT'S SUBMISSION

[22] It is the respondent's case that the alleged breach or negligence would have occurred from 2006 onwards and ended on 25 November 2008. The respondent argued that the tender drawings were prepared, completed and issued during the preliminary and design stages in around June and July 2006.

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[23] The revision of the thickness of the shear wall from 150mm–125mm was apparent in the tender drawings that were finalized in around June 2006. The design, which contained the design that led to the alleged structural defects, had been finalised and manifested in the tender drawings. If at all there were any breaches or negligence in the design as alleged, the breaches or negligence would have occurred in June 2006, in which case the appellant's action is time-barred.

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[24] PPS commenced construction work in around June 2007 and the respondent had also progressively issued construction drawings from that time onwards. The relevant construction drawings clearly show that the thickness of the shear walls for the apartment buildings was 125mm. The design error would have been apparent in the construction drawings as it was based on the tender drawings. If the errors found in the construction drawings gave rise to a cause of action such cause of action arose in June 2007. Thus, it is contended by the respondent the appellant's claim is time-barred.

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[25] PPS proceeded to carry out the construction of the structural work for the apartment buildings and built the shear wall at a thickness of 125mm in accordance with the drawings. The construction of the structural work for the apartment buildings was completed on 25 November 2008 and certified by the Project Architect SN Low & Associates Sdn Bhd.

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[26] The respondent argued that when the building was constructed the design errors had fully materialised. Therefore, all possible cause of action due

- A to design fault would have crystallised or accrued when the building construction work was completed on 25 November 2008.

DECISION

- B [27] The only issue before us is whether the appellant's claim against the respondent is time-barred. The appellant's claim against the respondent is for collateral works done due to structural defects.

- C [28] An application pursuant to O 18 r 19 of the ROC is a summary power to be exercised sparingly and only in cases where it is conspicuously clear that the claim on its face is obviously unsustainable (re: *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; [1999] 2 CLJ 886). If it can be shown that the pleadings disclosed some cause of action or raised some question fit to be decided, however slight the chances of succeeding, the case should not be regarded as suitable for summary striking out. In the case of *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417; [2000] 2 CLJ 457, Mokhtar Sidin JCA relied, inter alia, on the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 when considering an application under O 18 r 19(1)(a) of the ROC and surmised at p 428 (MLJ); p 465 (CLJ):

- F ... the court has to take into account the statement of claim on the face of it and no consideration whatsoever shall be paid to the evidence in the form of these affidavits. So long as the statement of claim discloses a reasonable cause of action, however weak the claim is, the claim cannot be struck off summarily. At that stage of the proceedings it is not for us or for the learned judge of the High Court to consider the merits of Carah's claim. On an application under O 18 r 19(1)(a) the court has only to consider whether the statement of claim discloses a reasonable cause of action.

- G [29] Gopal Sri Ram JCA (as he then was) in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113; [1996] 4 CLJ 716 at p 136 also took a similar path when he said:

- H The power to summarily strike out a pleading must be sparingly exercised, and in respect of the philosophy that underlies the exercise of that power, we can do no better than to quote from the judgment of Mohamed Dzaiddin SCJ in *Bandar Builder Sdn Bhd v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7:

- I This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleading disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial

is no ground for the pleadings to be struck out (see *Moore v Lawson* [1915] 31 TLR 418 and *Wenlock v Moloney & Ors* [1965] 1 WLR 1238).

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[30] Both the learned counsel argued extensively as to the dates of the accrual of the cause of action. The respondent argued that the appellant's cause of action would have arisen when the tender drawings were prepared, completed and issued during the preliminary and design stages in around June and July 2006 or on 25 November 2008 when the works completed. Therefore, by virtue of s 6(1) of the Limitation Act the claim of the appellant is time-barred.

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[31] The appellant however, further countered that the claim is not time-barred as the appellant only came to know of the structural defects when they were notified by the respondent themselves on 24 July 2009. Furthermore, the respondent had issued an acknowledgement when it admitted that the structural defects required collateral works to be carried out by PPS.

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[32] Prior to the discovery of the defects, PPS proceeded to carry out the construction of the structural work for the apartment buildings and built the shear wall at a thickness of 125mm in accordance with the approved drawings. The construction of the structural work for the apartment buildings was completed on 25 November 2008 and certified by the project architect. The appellant themselves did not know and could not have discovered the structural defects until they were alerted of its existence in 2009.

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[33] The respondent had even notified its insurer acknowledging the structural defects. Learned counsel for the appellant submitted that the notification to the insurer amounts to an admission and accrual of a fresh cause of action and thus fall within the ambit of s 26(2) of the Limitation Act 1953 which reads:

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... (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment: ...

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[34] On the facts and the law we found that there are triable issues of fact raised which could only be resolved by viva voce evidence at the trial and not merely by affidavit. The date of accrual of a cause of action is crucial to determine whether an action is time-barred as time runs from the date the cause of action arose. In actions for breach of contract, the cause of action arises at the date of the breach of the contract. However, in tort actions, the cause of action arises when the appellant suffers damage (re: *Kamariyah* and *AmBank*

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A *(M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663).

B [35] In this appeal before us there is a dispute as to the factual matrix of the case in particular with respect to the existence and discovery of the structural defects. Amongst the issues the trial court would need to determine are whether there were any breaches or negligence in the design as alleged, whether that even at the design stage it was foreseeable that it would cause the structural defects.

C CONCLUSION

D [36] Having considered the decision of the learned High Court judge in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we are of the respectful view that there is an appealable error that had been shown by the appellant that properly justify an appellate intervention.

E [37] Based on the foregoing reasons, we allow the appeal of the appellant with costs of RM20,000 subject to the payment of allocator. The decision of the High Court is set aside. This case is remitted to the High Court for full trial. The deposit is refunded.

F *Appeal allowed with costs of RM20,000 subject to allocator; decision of the High Court set aside; case remitted to the High Court for full trial.*

Reported by Dzulkarnain Ab Fatar

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